

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEITH L. SEELEY)	
Claimant)	
VS.)	
)	Docket No. 1,025,789
K-MART DISTRIBUTION CENTER)	
Respondent)	
AND)	
)	
AIG)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the December 27, 2006, Award entered by Administrative Law Judge Brad E. Avery. The Workers Compensation Board heard oral argument on March 28, 2007.

APPEARANCES

James L. Wisler of Lawrence, Kansas, appeared for claimant. Clifford K. Stubbs of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a September 2, 2005, accident and resulting back injury. In the December 27, 2006, Award, Judge Avery adopted the functional impairment opinion of Dr. Daniel D. Zimmerman and, accordingly, awarded claimant permanent disability benefits for a 15 percent whole person functional impairment.

Respondent and its insurance carrier contend Judge Avery erred. They argue claimant sustained a five percent whole person functional impairment as that rating is allegedly in accord with the *AMA Guides*¹ (4th ed.). Therefore, respondent and its insurance carrier request the Board to reduce claimant's award of permanent partial general disability benefits.

Conversely, claimant contends the Award should be affirmed.

The extent of claimant's functional impairment is the only issue on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties stipulated claimant injured his back on September 2, 2005, in an accident that arose out of and in the course of his employment with respondent.

Respondent referred claimant to Lawrence Occupational Health Services, where he was seen some of the time by Dr. Keith Sargent and Dr. Michael J. Geist. After a regimen of treatment that included medications, physical therapy, injections and a functional capacity evaluation, claimant was ultimately discharged from treatment with no work restrictions or limitations.

Claimant has returned to work for respondent in his regular job as a case pack order filler. He continues to experience pain in his low back but he does not have pain radiating into either leg.

The record contains two opinions regarding claimant's permanent functional impairment. Dr. Geist determined claimant had a five percent whole person impairment due to his low back injury. The doctor indicated claimant fell within the DRE (Diagnosis-Related Estimates) Lumbosacral Category II of the *AMA Guides*. But, as noted by Judge Avery, the doctor did not indicate in either his written report or testimony which edition of the *Guides* he utilized.

Dr. Daniel D. Zimmerman, who was hired by claimant's attorney to evaluate claimant, testified claimant had a 15 percent whole person functional impairment using the range of motion method set forth in the *AMA Guides* (4th ed.). The doctor explained:

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

I used the Range of Motion Model, which is indicated on page 112 to be acceptable if you are attempting to consider more than what the DRE Model will permit. So I used Table 75 on page 3/113. Because of the pathology affecting the lumbosacral spine, I gave him a 7 percent impairment of the body as a whole.

Because of range of motion limitation in extension of the lumbar spine, using Table 82 on page 3/130, he was given -- that's right -- he was given a 2 percent impairment of the body as a whole. That is not right. Using Table 81 on page 3/128 he was given a 2 percent impairment of the body as a whole.

Because of weakness in the L5 distribution bilaterally, he had a grade of 20 percent from Table 21 on page 4/151. The maximum percentage of impairment of the L5 nerve root is 37 percent of the lower extremity from Table 83 on page 3/130. The calculation formula set forth in Table 21B 4 and 5 requires that the 20 percent grade be multiplied by the 37 maximum percentage of impairment of the lower extremity due to weakness in that nerve root distribution. So 20 percent times 37 percent is 7.4 percent of the lower extremity. That's converted using the conversion formula in the 4th Edition AMA Guides to a body as a whole rating which is 3 percent. That would be true for each leg.

Using the Combined Value Chart pages 322 through 324 of the 4th Edition AMA Guides, 7 percent combined with 3 percent is 10 percent. 10 percent combined with 3 percent is 13 percent. 13 percent combined with 2 percent is 15 percent of the body as a whole.²

Nonetheless, Dr. Zimmerman also indicated claimant would have a 10 percent whole person functional impairment using the DRE method, presumably referring to some edition of the *Guides*.³ In reaching that conclusion, the doctor determined claimant had radicular weakness and radicular symptoms into the left hip area.⁴

The record also includes the medical report of Dr. John D. Ebeling, who evaluated claimant in January 2006 at Dr. Geist's request. Dr. Ebeling did not rate claimant's impairment. But Dr. Ebeling's report reveals claimant's MRI showed good alignment of the lumbar spine but degenerative disc changes with some mild bulging at L4-5 and L5-S1. And despite some foraminal narrowing at L5, the nerve roots and foramina appeared adequate. In summary, Dr. Ebeling thought claimant had mechanical back discomfort based on the two-level degenerative changes in his lower lumbar spine. Moreover, Dr. Ebeling did not see any radicular signs.

² Zimmerman Depo. at 9-11.

³ *Id.* at 14.

⁴ *Id.* at 14, 15.

Judge Avery determined claimant sustained a 15 percent whole person functional impairment due to his September 2005 accident. In reaching that conclusion, the Judge noted the record failed to disclose which edition of the *AMA Guides* Dr. Geist utilized in rating claimant's impairment.

The Workers Compensation Act defines functional impairment in K.S.A. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, the Act specifically requires impairment ratings to be measured using the fourth edition of the *Guides*.

Based upon the record presented, the Board affirms the Judge's finding that claimant sustained a 15 percent whole person functional impairment due to his September 2, 2005, accident. Like Judge Avery, the Board must disregard Dr. Geist's functional impairment rating as the record does not disclose that the doctor rated claimant under the *AMA Guides* (4th ed.). Moreover, it should be noted there is no testimony that the method utilized by Dr. Zimmerman was improper. In addition, respondent and its insurance carrier allegedly quote provisions from the *AMA Guides* (4th ed.) to attack Dr. Zimmerman's rating but the quoted information was not introduced into evidence and, therefore, is not part of the record.⁵

Although disregarding Dr. Geist's rating may seem somewhat harsh, the Board must apply the above-quoted statute's plain and unambiguous language. In addition, excluding Dr. Geist's rating due to failing to prove that it came from the required source comports with past Board decisions.⁶

⁵ See *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8, rev. denied 263 Kan. 885 (1997), which holds that portions of the *AMA Guides* that are attached to a brief are not part of the evidentiary record.

⁶ See *Roncone v. Lynn's Painting Service*, No. 1,021,823, 2006 WL 2328076 (Kan. WCAB July 2006) (respondent improperly cited sections from the *Guides* that were not part of the record); *Schneweis v. Western Beverage, Inc.*, No. 1,006,054, 2005 WL 1634404 (Kan. WCAB June 22, 2005) (administrative law judge should not go outside the record by citing sections of the *Guides* that are not introduced into evidence); and *Wood v. Aptus*, No. 205,240, 2000 WL 235492 (Kan. WCAB Feb. 28, 2000) (cannot consider ratings based on the 4th edition of the *Guides* if the 3rd edition revised is required).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the December 27, 2006, Award entered by Judge Avery to correct the computation of disability benefits, but otherwise affirms the decision.

Keith L. Seeley is granted compensation from K-Mart Distribution Center and its insurance carrier for a September 2, 2005, accident and resulting disability. Based upon an average weekly wage of \$662, Mr. Seeley is entitled to receive 62.25 weeks of permanent partial general disability benefits at \$441.36 per week, or \$27,474.66, for a 15 percent permanent partial general disability, making a total award of \$27,474.66, which is all due and owing less any amounts previously paid.

The Board notes that the Judge did not award claimant's counsel a fee for his services. The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

⁷ K.S.A. 2006 Supp. 44-555c(k).

Dated this ____ day of April, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge